

# ADDENDUM A

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2  
3 UNITED STATES DISTRICT COURT  
4 NORTHERN DISTRICT OF CALIFORNIA  
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6 CENTER FOR BIOLOGICAL DIVERSITY, a non-  
7 profit corporation,

8 Plaintiff,

9 v.

10 CHRISTINE T. WHITMAN, Administrator,  
11 Environmental Protection Agency, and WAYNE  
12 NASTRI, Region 9 Administrator, Environmental  
13 Protection Agency,

14 Defendants.  
15

No. C-02-1580 JSW

ORDER RE CROSS-  
MOTIONS FOR SUMMARY  
JUDGMENT

16 INTRODUCTION

17 Now before the Court are the cross-motions for summary judgment of Plaintiff Center for  
18 Biological Diversity and Defendants Christine Whitman, Wayne Nasty, and the U.S.  
19 Environmental Protection Agency ("EPA"). Having carefully reviewed the parties' papers and  
20 considered their arguments and the relevant legal authority, and good cause appearing, the Court  
21 hereby GRANTS Defendants' motion for summary judgment with respect to Plaintiff's claim that  
22 Defendants have violated Endangered Species Act ("ESA") § 7(a)(1). The Court DENIES  
23 Defendants' summary judgment motion on all other issues and claims and DENIES Plaintiff's  
24 motion for summary judgment.

25 FACTUAL AND STATUTORY BACKGROUND

26 In this action, the Plaintiff seeks to compel EPA to enter into consultation with the U.S.  
27 Fish and Wildlife Service ("FWS") regarding the impacts of EPA's pesticide registrations upon the  
28 California red-legged frog.

A. Pesticide Registrations

Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), EPA is

1 responsible for approving registrations of pesticides. 7 U.S.C. §§ 136-136y. Once registered, a  
 2 pesticide may be sold, and the registration determines the manner in which the pesticide may be  
 3 used. EPA's pesticide registration decisions must be based on several criteria, including the  
 4 environmental effects of the pesticides' intended use, and potential registrants must submit the data  
 5 necessary for EPA's evaluation of each pesticide. 7 U.S.C. § 136a(c)(5)(C)-(D); *id* § 136a(d).  
 6 Registrations are of indefinite duration, but pesticide registrations must periodically be reviewed,  
 7 and EPA's goal must be to review each pesticide's registration every fifteen years. *Id.* § 136a(g).  
 8 EPA retains discretion to alter the terms of a registration, compel submission of additional  
 9 information about a pesticide, cancel a registration, or re-register a pesticide. *Id.*

10 EPA currently has registered 953 separate pesticide active ingredients. Those ingredients  
 11 are currently used in about 19,000 different pesticide products.<sup>1</sup> Williams Decl. paragraph 16.  
 12 Many of those registrations have been in place for years, and neither party to this action has  
 13 submitted information summarizing when the pesticides at issue in this litigation were most  
 14 recently registered or re-registered.

#### 15 **B. Consultation Under the ESA**

16 The ESA creates a comprehensive statutory scheme for the protection of endangered  
 17 species. 16 U.S.C. §§ 1531-1544; *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 175-81 (1978).  
 18 Section 7 of the ESA contains specific provisions designed to prevent federal agencies from taking  
 19 actions harmful to listed species and creates affirmative obligations for those agencies to conserve  
 20 listed species. 16 U.S.C. § 1536. This case turns primarily on two of those specific provisions.

##### 21 **1. ESA § 7(a)(1)**

22 Section 7(a)(1) of the ESA requires federal agencies to, "in consultation with and with the  
 23 assistance of the Secretary (of the Interior), utilize their authorities in furtherance of the purposes of  
 24 this chapter by carrying out programs for the conservation of endangered species and threatened  
 25 species listed pursuant to section 1533 of this title." 16 U.S.C. § 1536(a)(1). This provision

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26  
 27 <sup>1</sup> Plaintiff and Defendants agree that this case focuses on pesticide ingredients; those  
 28 individual agreements may be used in multiple registered pesticide products.

creates a mandatory duty for federal agencies to engage in affirmative actions to conserve endangered species. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1416-17 (9th Cir. 1990). Agencies retain substantial discretion, however, to determine how best to fulfill this obligation. *Id.* at 716-18.

## 2. ESA § 7(a)(2)

Section 7(a)(2) of the ESA prohibits federal agencies from taking any action likely to jeopardize the survival of endangered or threatened species. 16 U.S.C § 1536(a)(2). Pursuant to this obligation, agencies must consult with FWS or the National Marine Fisheries Service (“NMFS”) in order to determine the likely effects of proposed agency actions upon listed species and the ways in which those effects can be avoided or mitigated. *Id.* FWS regulations implementing section § 7(a)(2) state that such consultation must be initiated whenever an agency determines that its action “may affect” a listed species, and that ongoing actions must be re-evaluated when species that may be affected by those actions are listed. 50 C.F.R. §§ 402.14, 402.16.<sup>2</sup>

## C. The California Red-legged Frog

The California red-legged frog’s historic range included much of California. Defs.’ Opp. Ex. 7; U.S. Fish and Wildlife Service, *Recovery Plan for the California Red-legged Frog* at 1 (2002). Largely due to land use changes, that population has been reduced, and the frog now lives only in isolated localities in the Sierra Nevada and northern Coast and Transverse ranges, in the

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<sup>2</sup> Amici contend, incorrectly, that these regulations do not bind EPA. Section 7(a)(2) does leave some ambiguity about which agency bears responsibility for determining when consultation must commence. Noting this ambiguity, four Supreme Court justices have described the allocation of this responsibility, and thus the ability of consultation regulations promulgated by agencies within the Department of the Interior to bind other agencies, as an open question. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-70 (1992) (Scalia, J.). The regulations themselves, however, clearly purport to bind other agencies. 50 C.F.R. § 402.03. FWS and NMFS noted that establishing regulations on consultation was consistent with their obligation to create regulations that promoted the conservation of listed species and that they had created these regulations with the approval of Congress. 51 Fed. Reg. 19926, 19928 (FWS and NMFS, June 3, 1986) The Ninth Circuit has found those regulations to be binding upon other agencies. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053-55 (9th Cir. 1994); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995). Accordingly, the regulations are binding upon EPA. EPA itself does not argue otherwise.

1 San Francisco Bay area, and along the central coast. *Id.* at 1-3. Within this range, the California  
2 red-legged frog uses a wide variety of habitat types, but it breeds primarily in ponds, stream pools,  
3 and other still or slow-moving waters. *Id.* at 12. According to FWS,

4 the California red-legged frog is threatened within its remaining range, by a wide  
5 variety of human impacts to its habitat, including urban encroachment, construction  
6 of reservoirs and water diversions, contaminants, agriculture, and livestock  
grazing... The introduction of non-native predators and competitors also continues  
to threaten the viability of many California red-legged frog populations.

7 *Id.* at 1. FWS listed the California red-legged frog as a threatened species in 1996. *Id.*

8 Plaintiff argues that pesticide use is one of the causes of the California red-legged frog's  
9 threatened status. Plaintiff notes the existence of substantial uncertainties about the causes of  
10 decline in amphibian populations in general and the California red-legged frog in particular. It also  
11 describes substantial uncertainties about both the extent to which the frog is exposed to particular  
12 pesticides and the toxicity of the pesticides to which it is exposed. Despite this lack of knowledge,  
13 Plaintiff contends that pesticides registered by EPA may be adversely affecting the frog. In support  
14 of this contention, Plaintiff offers evidence suggesting that pesticides are toxic to amphibians, that  
15 pesticides are applied in the vicinity of California red-legged frog habitat, and that pesticides  
16 migrate outside of areas of application and into surrounding habitat.

17 Plaintiff claims that Defendants have taken no affirmative steps, or at most negligible steps,  
18 to conserve the frog. Plaintiff also claims that EPA has not consulted with FWS about the effects  
19 of any pesticide upon the California red-legged frog. Plaintiff claims that these failures violate ESA  
20 §§ 7(a)(1) and 7(a)(2). Defendants claim that they have developed several outreach programs  
21 intended to protect endangered species from pesticides and that they have begun a general review  
22 of the effects of pesticides upon endangered species. Defendants concede that they have not  
23 consulted with FWS regarding the effects of any of its pesticide registrations upon the California  
24 red-legged frog. Defendants state, however, that they have begun the process of developing a plan  
25 for consulting with FWS on the effects of twenty-four pesticides on the frog and that they have  
26 developed a schedule for completing those consultations. Defendants contend that this schedule  
27 satisfies their obligations with respect to those twenty-four pesticides and that for the remaining  
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pesticides they are under no obligation to commence consultation.

Pursuant to this summary judgment motion, Plaintiff requests declaratory relief that EPA has violated its obligations under ESA §§ 7(a)(1), 7(a)(2), and 7(d).<sup>3</sup> Plaintiff requests an order directing EPA to begin consultation on any pesticide that may affect the red-legged frog, to suspend the registration of any such pesticide pending the completion of consultation, and, until consultation is completed, to decline to register any pesticide that may affect the frog. Plaintiff also requests that the Court set a deadline for EPA to complete its programs to conserve the California red-legged frog.

Defendants argue that their existing conservation programs satisfy their obligations under ESA § 7(a)(1). They also argue that because Plaintiff has demonstrated no causal connection between injuries to the red-legged frog and the individual pesticide registrations it seeks to challenge, it lacks standing to bring its § 7(a)(2) claim. For the same reason, Defendants argue that Plaintiff has not shown that any challenged pesticide may affect the frog and thus cannot prevail on the merits of its § 7(a)(2) claim. Accordingly, Defendants seek summary judgment in their favor.

## LEGAL STANDARD

### A. Summary Judgment

Summary judgment is granted when no genuine issue of material fact exists, and no reasonable trier of fact could find other than for the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party “has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once a summary judgment motion is made and properly supported, the nonmoving party may not rest on the mere allegations of its pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *See Fed*

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<sup>3</sup> Plaintiff also contends that EPA has violated ESA § 7(d). Section 7(d) prohibits EPA from making, during the consultation process, any irreversible and irretrievable commitments of resources that will foreclose its ability to implement FWS’s recommendations. 16 U.S.C. § 1536(d). Section 7(d) applies only during the consultation process, and thus Plaintiff’s effort to show a § 7(d) violation is contingent upon the outcome of its § 7(a)(2) claim.

1 R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 325.

2 **B. The Standard of Review for ESA Challenges is Provided by the Administrative**  
3 **Procedures Act**

4 The ESA contains no specific provision establishing standards for judicial review, and  
5 judicial review is thus governed by the Administrative Procedures Act. *Southwest Center for*  
6 *Biological Diversity v. Bureau of Reclamation*, 143 F.3d 515, 522 (1998). Under the  
7 Administrative Procedures Act, agency actions will be set aside if they are “arbitrary, capricious,  
8 an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(a).

9 **DISCUSSION**

10 Plaintiff argues that it is entitled to summary judgment on the merits of its claims.  
11 Defendants argue that Plaintiff lacks standing to bring its § 7(a)(2) claim and cannot prevail on the  
12 merits of either claim. For the following reasons, Defendants are entitled to summary judgment on  
13 Plaintiff’s § 7(a)(1) claim; neither side is entitled to summary judgment on any other claim.

14 **A. Defendants have Fulfilled their Obligations Under ESA § 7(a)(1)**

15 Plaintiff contends that EPA has failed to fulfill its obligation under § 7(a)(1) to take  
16 proactive steps, in consultation with FWS, to conserve the red-legged frog. Defendants argue that  
17 they are taking such steps and that their progress is sufficient to fulfill their statutory obligations.  
18 The Court finds that EPA indeed has taken some proactive steps and that those steps are sufficient  
19 to satisfy EPA’s obligations under § 7(a)(1).

20 Section 7(a)(1) of the ESA requires federal agencies to take affirmative steps to conserve  
21 listed species but allows agencies discretion to determine what steps they will take. *Pyramid Lake*  
22 *Paiute Tribe of Indians*, 898 F.2d at 1416-18. So long as an agency is taking some proactive steps  
23 and is not separately violating its § 7(a)(2) obligations, courts generally have found that the  
24 agency’s § 7(a)(1) obligations are met. *Compare Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d  
25 121, 135 (D.D.C. 2001) (finding that the Department of the Interior was in compliance with  
26 § 7(a)(1) because “[t]he record does not support a finding that defendants have failed entirely to  
27 carry out programs for the conservation of the pronghorn.”) with *Florida Key Deer v. Stickney*, 864

1 F. Supp. 1222, 1238 (S.D. Fla. 1994) (“FEMA has failed to consider or undertake *any* action to  
2 fulfill its mandatory obligations under Section 7(a)(1), and is therefore in violation of that  
3 provision of the ESA. Indeed, FEMA has *refused* to consult with the USFWS even after formal  
4 request to do so.”) (emphasis in original).

5 EPA contends that it has undertaken several programs for conservation of the red-legged  
6 frog. It states that it disseminates information on endangered species to pesticide users and  
7 distributors, that it maintains, in consultation with FWS, a public outreach program for endangered  
8 species, that it is involved in aquatic species protection efforts pursuant to its Clean Water Act  
9 programs, and that it has initiated, in combination with FWS and NMFS, an interagency proactive  
10 conservation review. EPA contends that, for organizational reasons, some of these efforts attempt  
11 to address multiple species simultaneously, but that the red-legged frog is nevertheless specifically  
12 addressed by these efforts.

13 Plaintiff contends that EPA has had similar proactive review policies in place for years  
14 without producing any results, and that the other programs are either too insignificant or  
15 insufficiently red-legged frog-specific to satisfy EPA’s § 7(a)(1) obligations. Accordingly,  
16 Plaintiff requests that the Court impose some kind of deadline on EPA's proactive conservation  
17 review. Such a deadline, however, would remove the discretion normally granted an agency in  
18 fulfilling its § 7(a)(1) obligations; just as the Court may not decide which course of action EPA  
19 must pursue, it also may not decide exactly when EPA must complete its actions. Because EPA is  
20 involved in proactive conservation activities, Defendants are entitled to summary judgment on  
21 Plaintiff's ESA § 7(a)(1) claim.

22 **B. Plaintiff has Standing to Bring its Claims**

23 Defendants contend that Plaintiff cannot show any causal relationship between the pesticide  
24 registrations it challenges and the injuries it seeks to redress, and accordingly lacks standing to  
25 bring its ESA § 7(a)(2) claim. The Court disagrees.

26 In order to demonstrate Article III standing, “a plaintiff must show (1) it has suffered an  
27 ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or  
28

1 hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is  
 2 likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”  
 3 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)  
 4 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). When a plaintiff seeks to  
 5 challenge a procedural violation, some uncertainty about redressability and causality is allowed.  
 6 *Lujan v. Defenders of Wildlife*, 504 U.S. at 573 n.7. A plaintiff challenging a procedural violation  
 7 need only show “(1) that he or she is a person who has been accorded a procedural right to protect  
 8 [his or her] concrete interests... and (2) that the [he or she] has ‘some threatened concrete interest ...  
 9 that is the ultimate basis of [his or her] standing.’” *Douglas County v. Babbitt*, 48 F.3d 1495, 1500  
 10 (9th Cir. 1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 573 n.7). The threat must derive  
 11 at least in part from the actions at issue in the case and not from some cause or party not before the  
 12 court. See *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir.  
 13 2000). The plaintiff also “must show that [his or her] interest falls within the ‘zone of interests’ that  
 14 the challenged statute is designed to protect.” *Douglas County*, 48 F.3d at 501.<sup>4</sup>

15 Plaintiff’s interest in this case is clear; it has submitted a member’s declaration describing  
 16 his affinity for the California red-legged frog and his concern that the red-legged frog’s population  
 17 is declining. Plaintiff has submitted evidence that pesticides in general are impacting California  
 18 red-legged frogs. It has submitted expert declarations and other evidence suggesting that the  
 19 specific pesticides at issue may be found in red-legged frog habitat. It also has submitted some  
 20 chemical-specific evidence that some of those challenged pesticides are harmful to California red-  
 21 legged frogs. All of this information supports procedural challenges. Defendants argue that the  
 22 Court should not be persuaded by Plaintiff’s evidence, but Defendants’ contentions create a dispute  
 23 on the merits of Plaintiff’s § 7(a)(2) claim, not a jurisdictional issue. Moreover, although each

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 25 <sup>4</sup> Defendants suggest a somewhat stricter standard for the standing inquiry. In support of  
 26 this standard, they rely heavily upon *Washington Toxics Coalition v. EPA*, Civ. No. 01-132C (W.D.  
 27 Wa. July 2, 2002). *Washington Toxics* does apparently set forth, in a case with strong factual  
 28 similarities to this action, a more stringent legal standard for establishing standing to challenge  
 procedural violations. To the extent that it does so, however, it is inconsistent with Ninth Circuit  
 precedent.

pesticide registration is a discrete agency action potentially subject to separate challenge, the evidence submitted by both sides is not conducive to a pesticide-by-pesticide evaluation of the evidentiary basis for Plaintiff's claims.<sup>5</sup> The declarations indicate that Plaintiff has an interest in this case, that the procedural provisions at issue are designed to protect interests like Plaintiff's, and that disputed issues of fact remain about the causal connections between Defendants' actions and those injuries. Plaintiff has standing to assert its claims.

**C. Issues of Material Fact Remain with Respect to Plaintiff's ESA § 7(a)(2) Claim**

**1. Issues of Material Fact Remain About Whether Individual Pesticides may Affect the California Red-legged Frog**

The core question raised by Plaintiff's § 7(a)(2) claim is whether the registered pesticides may actually affect the California red-legged frog.<sup>6</sup> Both parties have submitted voluminous documentation regarding what is known and what is uncertain about the effects of pesticides upon the California red-legged frog, but neither party has submitted sufficient evidence or argument to allow the Court to resolve this claim. Since each pesticide registration represents an independent agency action, and since the set of challenged pesticides contain a diverse set of chemicals likely to have a wide range of uses, modes of transport, and toxicological effects, the Court cannot lump all

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<sup>5</sup> Amici argue that this claim brings an impermissible programmatic challenge and that Defendants therefore are entitled to summary judgment. Plaintiff and Defendants agree, however, that Plaintiff has challenged specific agency actions, and this argument is without merit.

<sup>6</sup> The predicate to any ESA § 7(a)(1) claim is an agency action, and amici also contend that the challenged actions here are wholly past and therefore are not subject to challenge. This argument is incorrect. Under ESA section 7(a)(2), ongoing actions may be challenged, and an action is considered ongoing if the agency retains significant discretion to adjust its activity in order to protect the endangered or threatened species for which consultation might be initiated. *Compare Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994) (finding continuing discretion), with *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995), and *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073, 1079-81 (9th Cir. 2001) (finding an absence of discretion). EPA has authority to review pesticide registrations at any time and may revoke or alter registrations if it determines that pesticide use will cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(g)(1)(B); *id.* § 136a(d)(2); Defs.' Opp. at 8 n.9. Because of this continuing discretion, pesticide registration constitutes ongoing agency action under § 7(a)(2) of the ESA.

pesticides together, and must review each pesticide registration independently.<sup>7</sup> Plaintiff's evidence does suggest connections between pesticide use and harm to the California red-legged frog, but it is not organized in a fashion that would permit the Court to assess, on a pesticide-by-pesticide basis, the merits of Plaintiff's contentions that individual pesticides may affect the red-legged frog.<sup>8</sup> Defendants' declarations are primarily oriented toward explaining the degree of uncertainty regarding the effects of pesticides on the frog. The existence of uncertainty does not indicate that pesticides will not affect the red-legged frog, and Defendants do not offer any pesticide-by-pesticide rebuttal of Plaintiff's claims of ill effect. With scientific disputes remaining and a record that does not clearly support either side, the Court cannot grant either motion for summary judgment on the § 7(a)(2) claim. Summary judgment on this claim is denied.

**2. Neither Party is Entitled to Summary Judgment with Respect to those Pesticides for which EPA has Developed a Consultation Schedule**

In its 2002 Recovery Plan for the red-legged frog, FWS listed 24 "chemicals of greatest concern for which data on amphibians, fish, or their food supply could be found."<sup>9</sup> *Recovery Plan for the California Red-legged Frog* at 120-25.

Defendants have not yet begun consultation on the effects of registration of each of these chemicals, but have agreed with FWS on a schedule for such consultation. They maintain that the

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<sup>7</sup> Plaintiffs repeatedly argue that harms to the frog are exacerbated by the cumulative effect of exposures to multiple pesticides, and that such cumulative effects are typically ignored by pesticide-by-pesticide risk analyses. The necessity of pesticide-by-pesticide judicial review does not foreclose consideration of such cumulative effects, but such consideration nevertheless must occur in the context of challenges to individual agency actions.

<sup>8</sup> Plaintiff suggests that at trial Defendants will bear the burden of showing that registered pesticides do not affect the California red-legged frog. This contention mischaracterizes Plaintiff's burden of proof. Plaintiff need only show that a pesticide may affect the frog, but if there is no evidence at all regarding the possible effects of a particular pesticide upon the frog, the Court cannot determine that EPA erred in failing to initiate consultation. In other words, Plaintiff cannot prevail without demonstrating that there is at least some question about whether a pesticide registration would affect the frog.

<sup>9</sup> Those chemicals are acephate, azinphos-methyl, carbaryl, chlorpyrifos, diazinon, dicofol, disulfoton, endosulfan, esfenvalerate, fenamiphos, glyphosate, malathion, mancozeb, methamidophos, methoprene, naled, paraquat, permethrin, phosmet, polycyclic aromatic hydrocarbons, pyrethrins, rotenone, strychnine, triclopyr, and trifluralin. With the exception of polycyclic aromatic hydrocarbons, Plaintiff has challenged the registrations of all of these chemicals.

1 existence of that schedule means they have met, if not exceeded, their § 7(a)(2) obligations. They  
 2 argue that Plaintiff has not shown that they were obliged to undertake consultation at all, and that  
 3 even if consultation was obligatory, their schedule meets with the timing requirements set forth in  
 4 *Telecommunications Research & Action Center* (“TRAC”) v. FCC, 750 F.2d 70, 80 (D.C. Cir.  
 5 1984),<sup>10</sup> which discusses judicial review of agency delay. Plaintiff agrees that the schedule is  
 6 reasonable but argues that it constitutes a proper remedy for non-compliance, not compliance in of  
 7 itself. It also argues that because EPA’s duty was to consult before approving the pesticides, the  
 8 TRAC test is not applicable.

9       Regardless of whether those pesticides may affect the California red-legged frog, disputed  
 10 issues of material fact remain about whether EPA’s schedule constitutes compliance with § 7(a)(2).  
 11 Section 7(a)(2) normally requires that consultation precede action. Some of the registrations here  
 12 at issue may have been approved *before* the California red-legged frog was listed, however, and  
 13 thus registration would have preceded any consultation requirement. In such a situation, the ESA  
 14 provides only general guidance about proper timing of consultation. FWS’s enforcement  
 15 regulations require consultation when new species are listed or new information becomes available  
 16 and state that “[e]ach federal agency shall review its actions at the earliest possible time.” 50  
 17 C.F.R. § 402.16; *id.* § 402.14. The ESA itself leaves no doubt that Congress intended to force  
 18 abrupt changes to any course of action that might place a species at risk. *Tennessee Valley*  
 19 *Authority*, 437 U.S. at 172-73. Despite this mandate for haste, the statute does not set forth a  
 20 specific timetable for initiating consultation following a new listing or the availability of new  
 21 information. Some agency discretion therefore must continue to exist, and the TRAC factors apply.

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 23       <sup>10</sup> TRAC states that “(1) the time agencies take to make decisions must be governed by a  
 24 rule of reason, (2) where Congress has provided a timetable or other indication of the speed with  
 25 which it expects the agency to proceed in the enabling statute, that statutory scheme may supply  
 26 content for this rule of reason, (3) delays that might be reasonable in the sphere of economic  
 27 regulation are less tolerable when human health and welfare are at stake; (4) the court should  
 28 consider the effect of expediting delayed action on agency activities of a higher or competing  
 priority; (5) the court should also take into account the nature and extent of the interests prejudiced  
 by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to  
 hold that agency action is unreasonably delayed.” 750 F.2d at 80 (citations omitted).

1 Neither side has offered specific information about when the registrations of these twenty-  
2 four pesticides were most recently reviewed or about when EPA became aware of risks these  
3 pesticides potentially pose to the California red-legged frog. Accordingly, the Court lacks  
4 sufficient information to evaluate whether EPA's schedule constitutes compliance with the ESA.  
5 Summary judgment with respect to these twenty-four pesticides is denied.

6 **CONCLUSION**

7 For the foregoing reasons, Defendants' motion for summary judgment is GRANTED with  
8 respect to Plaintiff's claim that Defendants have violated § 7(a)(1) of the ESA. Defendants'  
9 motion for summary judgment is DENIED with respect to all other claims. Plaintiff's motion for  
10 summary judgment is DENIED.

11 **IT IS SO ORDERED.**

12  
13 Dated: June 30, 2003

/s/ Jeffrey S. White  
UNITED STATES DISTRICT JUDGE